No. 14,697

IN THE

United States Court of Appeals

For the Ninth Circuit

KETHEL OSBORNE,

Appellant,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

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JURISDICTION.

This Court has jurisdiction of this appeal under Sections 1294(1), 2253 and 2255 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant filed a petition for a writ of habeas corpus on November 17, 1954 (Tr. 18). It was alleged in the petition that appellant was in custody of respondent by virtue of a commitment of the United States Army, No. 365832 (Tr. 14). The petition attacked the jurisdiction of the Court Martial on the

ground that "a member of that court had threatened petitioner prior to trial, promising to find him guilty, irrespective of the evidence" (Tr. 14).

On November 30, 1954, United States District Judge Oliver J. Carter issued an order to show cause directed to the then Warden of the United States Penitentiary at Alcatraz, E. B. Swope (Tr. 18). On December 10, 1954, respondent filed his return (Tr. 19). It was alleged in the return *inter alia* that petitioner had previously applied for a writ of habeas corpus on the same ground urged in the present petition (Tr. 20). It was further alleged that the petitioner did not petition for a grant of review as prescribed by Article 67(c) of the Uniform Code of Military Justice (Tr. 20). This fact was admitted by appellant in his prior petition for habeas corpus (Tr. 7, 8).

On December 22, 1954, United States District Judge Louis E. Goodman found that since the allegations of the return were not traversed, they would be accepted as true pursuant to Section 2248 of Title 28 United States Code. The Court further found that no petition for review was made pursuant to Article 67(c) of the Uniform Code of Military Justice (Tr. 21). The Court concluded that petitioner's claims did not go to the jurisdiction of the Court Martial by which petitioner was tried, and denied the petition for a writ of habeas corpus (Tr. 22).

On December 23, 1954, one day after Judge Goodman's order, petitioner filed what he termed an answer and traverse in which he generally denied the allegations of the return (Tr. 23).

On January 20, 1955, petitioner moved to vacate the Court's order of December 22, 1954, stating the reason that he had not answered the government's return was because of infractions of prison rules he was in solitary confinement prior to December 21, 1954 (Tr. 24, 25). The Court denied the motion to vacate on January 25, 1955 (Tr. 26).

On January 31, 1955, appellant appealed from the orders of December 22, 1954, and January 25, 1955 (Tr. 26).

QUESTIONS PRESENTED.

1. Did appellant exhaust his administrative remedies?

2. May a Court Martial judgment be collaterally attacked on the grounds that a member of the Court Martial was biased and prejudiced against the defendant?

3. Does a failure to challenge a member of a Court Martial, alleged to be biased and prejudiced, pursuant to Article 41 of the Uniform Code of Military Justice, preclude objection to the jurisdiction of a Court Martial?

4. May a Court in its discretion refuse to entertain repetitious writs of habeas corpus?

5. Did appellant adequately show that his military review was inadequate under the rule of *Burns v. Wilson,* 346 U.S. 137?

ARGUMENT.

I. APPELLANT DID NOT EXHAUST HIS ADMINISTRATIVE REMEDIES.

Appellant claims in his petition to have exhausted his remedies under Articles 67 and 73 of the Uniform Code of Military Justice (50 U.S.C. 654, 660) (Tr. 14). However, to require a Court to assume jurisdiction on a mere conclusion of law is improper. *Collins v. McDonald,* 258 U.S. 416, 420, 421; *United States v. Ju Toy,* 198 U.S. 253, 261. No facts are alleged by petitioner which would indicate that any application for review had been in fact made. The record indicates clearly to the contrary. In appellant's petition of July 7, 1954, appellant alleged that he had failed to apply for relief in the Court of Military Appeals within the statutory period (Tr. 7, 8). Exhaustion of administrative remedies is basic to judicial review of any administrative decision including review of judgments of Court Martials. *Hunter v. Beets,* 180 F.2d 101; *Simmons v. Hunter,* 179 F.2d 664.

Article 73 of the Uniform Code of Military Justice (50 U.S.C. 660) provides that any time within one year after approval of a Court Martial sentence extending to confinement for one year or more, the accused may petition the Judge Advocate General for a new trial on grounds of fraud on the Court. Appellant has not affirmatively alleged that he so applied. Article 73 is based on Article of War 53 (10 U.S.C. 1525). It has been held that a failure to make application for relief under this section precludes resort to habeas corpus. *Simmons v. Hunter,* supra; *McMahan v.*

Hunter, 179 F.2d 661, 663; *Spencer v. Hunter,* 177 F.2d 370.

By failing to allege that relief was requested under Articles 67 and 73 of the Uniform Code of Military Justice and denied under those sections, appellant has failed to allege facts necessary to the jurisdiction of the District Court. Without such a showing the District Court could not proceed. The petition was, therefore, properly dismissed for lack of jurisdiction.

II. APPELLANT'S CLAIM OF BIAS AND PREJUDICE DID NOT GO TO THE JURISDICTION OF HIS COURT MARTIAL.

At common law the judgment of a judge who was in fact disqualified to sit in the particular case was not subject to collateral attack. *In re Rury* (9th Cir.), 21 F.2d 881. The judgment was merely voidable and subject to attack only on appeal. *Owens v. Dancy,* 36 F.2d 882, 884.

The Supreme Court has decided that the common law rule applies in review by civil Courts of convictions in Court Martial cases. In *Swaim v. United States,* 165 U.S. 553, at 561, the defendant had challenged a member of a Court Martial pursuant to Article of War 18 (10 U.S.C. 1489) for bias and prejudice. It should be noted that this article provides that "each side shall be entitled to one peremptory challenge." The Court nevertheless held that this question could not be urged on collateral attack of the Court Martial judgment.

Here, it is not alleged that the purported biased member was even challenged by the defendant at his Court Martial, but here, as there, an attempt is being made to question the jurisdiction of the Court Martial on the grounds that a member of the Court was biased and prejudiced. This Court should hold as the Supreme Court did that such a claim may not be adjudicated in a collateral action.

Appellant alleged that a certain altercation occurred between him and a member of his Court prior to the time of his trial (Tr. 16). No allegation was made that Captain Kindred was challenged by either appellant or his counsel pursuant to Article 41 of the Uniform Code of Military Justice (50 U.S.C. 616). The only case interpreting Article 41 of the Uniform Code of Military Justice or Article of War 18 upon which it was based is *Swaim v. United States,* supra. A similar provision, however, deals with the disqualification of judges of the District Court—Sections 144 and 455 of Title 28 United States Code. Under these sections the cases have held uniformally that even on appeal any defect is waived if an affidavit of bias and prejudice is not timely filed. *Eisler v. United States,* 170 F.2d 273, 277; *Hibdon v. United States,* 213 F.2d 869; *Kramer v. United States* (9th Cir.), 166 F.2d 515, 518, and cases cited in Note 3.

In the present case it does not appear that any challenge was in fact made. This Court had occasion to comment upon this situation in a case involving a claim of prejudice on the part of a United States District Judge in a habeas corpus action. In *Taylor v.*

Swope (9th Cir.), 179 F.2d 640, this Court said "a defendant cannot take his chances with a judge and then if he thinks that the sentence was too severe secure a disqualification and a hearing before another judge." Appellant, like Taylor, failed to question the Court's qualifications although, if the transaction he refers to actually occurred, aware of the facts prior to trial, he may not question them now. By failing to exercise Article 41, he has waived any disqualification and consented to the trial by the Court Martial which convicted him. *Neil v. United States* (9th Cir.), 205 F.2d 121 and cases cited in Note 20.

III. NO SHOWING HAS BEEN MADE BY APPELLANT THAT HIS MILITARY REVIEW WAS INADEQUATE.

In military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases. *Hiatt v. Brown,* 339 U.S. 103. This is so because of the peculiar relationship between the civil and military law. *Burns v. Wilson,* 346 U.S. 137, 139-140. The only question before the Court in any case is whether the military Court had jurisdiction of the person and the subject matter of the case. *In re Grimley,* 137 U.S. 147, 150.

In the present case it is admitted that such jurisdiction existed. Appellant does not question that the Court had jurisdiction of the offense for which he was tried or that he was a person subject to military law. He merely claims that the Court could have acted improperly because one of its members allegedly had

shown an animosity towards him. The place where this question should have been litigated is in the Courts which Congress has provided for the trial and review of military cases. *In re Yamashita,* 327 U.S. 1; *Burns v. Wilson,* supra.

It is the limited function of the civil Courts to determine whether the military have given fair consideration to claims made. *Burns v. Wilson,* supra, at page 144; *Whelchel v. McDonald,* 340 U.S. 122. The *Burns* case involved claims of illegal detention, coerced confessions, denial of counsel of their choice and other serious constitutional claims. See also *Hiatt v. Brown,* supra, and *Humphrey v. Smith,* 336 U.S. 695, where serious claims of error were made. The Supreme Court, however, has decided, after reviewing the clear attempt by Congress to set up a separate hierarchy of Courts for the military, that the petitioner must show his military review was inadequate before he may resort to the civil Courts. *Burns v. Wilson,* supra, at page 146. This Court has come to the same conclusion in the recent case of *Mitchell v. Swope,* No. 14,595, decided July 6, 1955. See also Article 76 of the Uniform Code of Military Justice (50 U.S.C. 663). Here, appellant has made no claim that his military review was inadequate. No statement was made that this ground was urged to the military Courts and, by them, denied.

It should be noted that if appellant's contention is correct, and the petition here is materially different than the petition urged to Judge Hamlin, then no opportunity has ever been granted for the military

authorities to inquire into the facts. It is clear, however, that the contention urged here is merely another variation on the theme of bias and prejudice which has been urged before. Repetitious writs of habeas corpus are an abuse of the judicial process. In the case of such petitions the Court in its discretion may refuse to entertain them under Section 2244 of Title 28 United States Code. *Swihart v. Johnston* (9th Cir.), 150 F.2d 721, 722; *De Maurez v. Swope* (9th Cir.), 110 F.2d 565; *Waley v. Johnston* (9th Cir.), 163 F.2d 556.

CONCLUSION.

The District Court properly denied a writ of habeas corpus in the present case. The judgment below should be affirmed.

Dated, San Francisco, California,
July 22, 1955.

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